Supreme Court, U. S.
FILED
MAY 4 1977
MICHAEL RODAK, JR., CLERK

No. 76-1221

In the Supreme Court of the United States

OCTOBER TERM, 1976

INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, ET AL., PETITIONERS

v.

EARL J. SMITH

ON PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondent Earl J. Smith, a World War II veteran, brought this suit under Section 9 of the Military Selective Service Act of 1967, 62 Stat. 604, 614, as amended, 50 U.S.C. App. 459, to obtain credit for his time in the military service in the computation of benefits under petitioners' pension plan.[1]

After working continuously for more than 12 years for Pabco, the predecessor company to petitioner Bird & Son, respondent was drafted into the armed services in 1942. He applied for reinstatement in October 1945, following an

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[1]The Department of Justice represented respondent pursuant to 50 U.S.C. App. 459(d) (now 38 U.S.C. (Supp. V) 2022).

honorable discharge, was actually returned to work several months later following a strike, and worked continuously until his retirement in November 1970. In 1956, petitioner Industrial Employers and Distributors Association (IEDA), an employers' association, adopted a pension plan on behalf of Pabco and IEDA's other members. The plan allotted a year of past credited service for each year prior to 1956 in which employees worked 1,500 to 1,730 hours,[2] and provided that one-twelfth of a future service credit would be accorded for every month in which the employee was employed on the twentieth day of the month and had been continuously employed for the thirty preceding days. Neither future nor past service credits are awarded under the plan during periods of military service. Thus when the petitioners computed Mr. Smith's past service credits upon his retirement, they refused to count the 34 months he had spent in the armed forces, thereby reducing his monthly pension benefit by $17.71 for the period from January 1, 1971 through December 31, 1973, and $23.39 from January 1, 1974 to the present (Pet. App. 2-4, 13-15).[3]

This suit was filed on August 29, 1973 against Bird & Son, as Pabco's successor, and against IEDA as trustee of the pension fund. The complaint alleged that petitioners were required by the Act to credit Mr. Smith with his 34 months of military service in calculating the amount of his retirement benefits. The district court held that pension benefits, like the severance benefits at issue in *Accardi* v.

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[2]At the time of enactment, the plan excluded from past service all work performed prior to an employee's fortieth birthday. The plan was amended in 1970 to give each employee credit for work performed after his thirtieth birthday.

[3]The amount of the monthly benefit is derived by multiplying the employee's total years of credited service by a fixed dollar amount. Plan Section 6 (Pet. App. 28-32).

Pennsylvania R.R. Co., 383 U.S. 225, were by their "real nature" perquisites of seniority toward which Mr. Smith was entitled to count his time in the military service as time on the job. 385 F. Supp. 1281 (N.D. Cal.)(Pet. App. 12-21). The court of appeals affirmed on different grounds. It held that past service credits, although awarded under the plan on the basis of a substantial work requirement, were essentially a product of "length of service" and thus seniority perquisites protected by the statute. The court held that future credits were equivalent to deferred wages for actual employment similar to the vacation pay at issue in *Foster* v. *Dravo Corp.*, 420 U.S. 92, and were therefore not protected by the Act, regardless of the general nature of pension benefits. 546 F. 2d 314 (Pet. App. 1-11).

2. As petitioners have recognized (Pet. 6), the issue presented in this petition is identical to the issue presented in *Alabama Power Co.* v. *Davis*, No. 76-451, certiorari granted January 10, 1977, argued April 25-26, 1977, namely, whether the seniority provisions of the Military Selective Service Act, as amended, 50 U.S.C. App. 459,[4] require a private employer to credit a returning veteran with his time in the military service when computing the veteran's pension benefits.

Petitioners fear, however, that "the question may drop out of the *Alabama Power* case" (Pet. 6). Their apprehension is unwarranted. As we noted in our brief in that case (a copy of which we are sending to petitioners), there is no substantive difference between eligibility requirements expressed in hours and those expressed in terms of a year's

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[4]The veterans' reemployment provisions at issue here have recently been re-codified without significant change in 38 U.S.C. (Supp. V) 2021 *et seq.*, by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1578, 1594.

service, where, as here, the hour requirement is equivalent to a year's work and the employee does not gain additional credit for hours worked in excess of the requirement. Brief for Respondent in *Alabama Power Co.* v. *Davis*, pp. 14-15; see *Palmarozzo* v. *Coca-Cola Bottling Co.*, 490 F. 2d 586 (C.A. 2). See also Brief for Respondent in *Alabama Power Co.* v. *Davis*, p. 22, n. 33, for a discussion of the court of appeals' decision in this case.

We therefore believe the two cases are indistinguishable and that the Court's decision in *Alabama Power* will control the present case.

Accordingly, we suggest that action on the petition in the instant case be deferred pending a final decision in *Alabama Power*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.